

1 Jordan S. Stanzler (State Bar No. 54620)
2 Melinda Jane Steuer (State Bar No. 216105)
2 STANZLER LAW GROUP
3 2275 E. Bayshore Road, Suite 100
3 Palo Alto, CA 94303
4 Telephone: (650)739-0200
4 Facsimile: (650)739-0916

5 Attorneys for Respondent/Cross-Petitioner
Kenneth C. Shaffer

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

11 WELLS FARGO ADVISORS, LLC, a
limited liability company.

Case No. 11-CV-01500 SC

Petitioner,

vs.

KENNETH C. SHAFFER, an individual,
15
Respondent.

Respondent.

**RESPONDENT KENNETH C.
SHAFFER'S NOTICE OF MOTION
AND MOTION TO CONFIRM
ARBITRATION AWARD AND ENTER
JUDGMENT THEREON;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

DATE: June 10, 2011
TIME: 10:00 a.m.
COURTROOM: 1, 17th Floor

TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

21 NOTICE IS HEREBY GIVEN that on June 10, 2011 at 10:00 a.m., or as soon thereafter
22 as the matter may be heard by the above-entitled Court, located at 450 Golden Gate Avenue, San
23 Francisco, California, 94102, in the courtroom of the Hon. Samuel Conti, Respondent and
24 Cross-Petitioner Kenneth C. Shaffer will and hereby does move the Court pursuant to 9 U.S.C. §
25 9 for an order confirming the arbitration award issued *In the Matter of the Arbitration Between*
26 *Wells Fargo Investments, LLC and Kenneth C. Shaffer*, FINRA Case No. 10-00773 and entering
27 judgment thereon. This motion is made on the grounds that confirmation of the award pursuant

1 to 9 U.S.C. § 9 is mandatory unless the award is vacated or corrected based upon one of the
2 grounds set forth in 9 U.S.C. §§ 10 & 11.

3 This motion is based on this Notice of Motion and Motion, the Memorandum of Points
4 and Authorities attached hereto, the Declaration of Kenneth C. Shaffer filed herewith, the
5 pleadings and papers on file herein, and upon such other matters as may be presented to the Court
6 at the time of the hearing.

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I. INTRODUCTION**

9 Cross-petitioner Kenneth C. Shaffer was a respondent and cross-claimant in an arbitration
10 action initiated by Cross-Respondent Wells Fargo Investments, LLC (“WFI”), the predecessor
11 company to Cross-Respondent Wells Fargo Advisors, LLC (“WFA”). WFI expressly agreed to
12 have all disputes with Mr. Shaffer resolved by binding arbitration before the Financial Industry
13 Regulatory Authority (“FINRA”) and to abide by and perform any awards rendered by FINRA in
14 the arbitration. The arbitration hearing was held in San Francisco, California, before a panel of
15 FINRA arbitrators, January 4, 2010 and January 5, 2010. Mr. Shaffer prevailed at the
16 arbitration. The arbitrators denied WFI’s claims in their entirety. The arbitrators ordered WFI
17 to pay Mr. Shaffer damages of \$75,000. WFI and its successor WFA have failed and refused to
18 pay Mr. Shaffer the damages awarded to him by the arbitrators. Consequently, Mr. Shaffer is
19 entitled to confirmation of the award and entry of judgment thereon, pursuant to 9 U.S.C. § 9.

20 **II. PROCEDURAL HISTORY**

21 Kenneth C. Shaffer signed a promissory note with Wells Fargo Investments, LLC
22 (“WFI”), the predecessor company to Wells Fargo Advisors, LLC (“WFA”), in January of 2008.
23 (Exh. 1.) In that Note, WFI inserted an arbitration provision which provided that any
24 controversy regarding the validity, enforcement, or construction of this Note, or any dispute
25 concerning Mr. Shaffer’s employment or termination of employment with WFI, shall be resolved
26 by binding arbitration under the rules of the National Association of Securities Dealers (now

27

28

1 known as FINRA¹). (Exh. 1 p. 2.) This arbitration provision further provides that any state or
 2 federal court with jurisdiction may enter judgment upon any arbitration award. (Exh. 1 p. 2.)

3 In February of 2010, WFI filed a Statement of Claim against Mr. Shaffer with FINRA
 4 Dispute Resolution. (Exh. 2.) WFI alleged that it was entitled to recover \$74,617.76 plus
 5 interest and attorneys fees pursuant to the terms of the promissory note. (Exh. 2.) WFI also
 6 executed and submitted a FINRA Arbitration Submission Agreement, on February 2, 2010, by
 7 which it submitted the matter in controversy, including the allegations set forth in the Statement
 8 of Claim, as well as all answers and all related cross claims, counterclaims and/or third party
 9 claims, to binding arbitration in accordance with the FINRA By-Laws, Rules and Code of
 10 Arbitration Procedure. (Exh. 3.) WFI expressly agreed to be bound by FINRA's rules and
 11 procedures. (Exh. 3.) WFI agreed to abide by and perform any award(s) rendered by the
 12 arbitration panel. (Exh. 3.) Finally, WFI agreed that a judgment and any interest due thereon
 13 may be entered upon any such arbitration award, and that it voluntarily consented to submit to the
 14 jurisdiction of any court of competent jurisdiction which may properly enter such judgment.
 15 (Exh. 3.)

16 In April, 2010, Mr. Shaffer submitted an Answer to WFI's Statement of Claim and a
 17 FINRA Arbitration Submission Agreement. (Exh. 4.) In May of 2010, Mr. Shaffer submitted a
 18 Counter-claim in the Arbitration. (Exh. 5.) This Counter-claim was submitted on a FINRA
 19 Claim Information Sheet form, which is available on FINRA's web-site. (Exh. 5; Decl. of
 20 Kenneth C. Shaffer ¶ 6.) This form lists the types of disputes and claims which FINRA hears
 21 and decides, with boxes to be checked for the applicable claims. (Exh. 5.) Mr. Shaffer checked
 22 the boxes for "Commissions", "Discrimination Disability", "Libel or Slander on Form U-5",
 23 "Promissory Notes", "Wrongful Termination" and "Defamation" on this form. (Exh. 5.) On or
 24 about May 25, 2010, WFI filed a response to Mr. Shaffer's counterclaims. (Shaffer Decl. ¶ 7.)

25

26

27 ¹ The National Association of Securities Dealers changed its name to the Financial Industry Regulatory Authority
 28 ("FINRA") in 2007, when it merged with the regulatory arm of the New York Stock Exchange.

1 A two day evidentiary hearing was held in San Francisco, California before a FINRA
 2 arbitration panel on January 4, 2011 and January 5, 2011. (Exh. 6.) The arbitrators were Thomas
 3 D. Reese, Laurel Littman Gothelf, and Marlyn G. McClaskey. (Exh. 6.) WFI was represented
 4 by Ronald P. Kane, Esq. of Kane & Fisher, Ltd. (Exh. 6.) Mr. Shaffer appeared in pro per.
 5 (Exh. 6.) He could not afford to afford to retain an attorney to represent him. (Shaffer Decl. ¶ 8.) The
 6 panel heard extensive testimony from Mr. Shaffer, and from employees and agents of WFI.
 7 (Shaffer Decl. ¶ 8.) Numerous documents were received into evidence. (Shaffer Decl. ¶ 8.)

8 On January 18, 2011, the arbitrators issued their award. (Exh. 6.) The panel denied
 9 WFI's claims against Mr. Shaffer in their entirety. (Exh. 6.) The panel ruled that WFI shall pay
 10 compensatory damages in the amount of \$75,000.00 to Mr. Shaffer. (Exh. 6.) The panel further
 11 recommended that the Termination Comment in Mr. Shaffer's Form U-5 be expunged and
 12 replaced with other language, as set forth in the award. (Exh. 6.)

13 **III. MR. SHAFFER IS ENTITLED TO CONFIRMATION OF THE ARBITRATION
 14 AWARD PURSUANT TO 9 U.S.C. § 9.**

15 Pursuant to section 9 of the Federal Arbitration Act ("FAA"), if the parties in their
 16 agreement have agreed that a judgment of the court shall be entered upon the award made
 17 pursuant to the arbitration, and shall specify the court, then at any time within one year after the
 18 award is made any party to the arbitration may apply to the court so specified for an order
 19 confirming the award, and thereupon the court must grant such an order unless the award is
 20 vacated, modified, or corrected as prescribed in sections 10 and 11 of the FAA. (9 U.S.C. § 9.)
 21 If no court is specified in the parties' agreement, then such application may be made to the
 22 United States district court in and for the district within which such award was made. (*Id.*)

23 As set forth in 9 U.S.C. § 9, confirmation of the award is mandatory, unless it is vacated,
 24 modified or corrected as prescribed in sections 10 & 11 of the FAA. (*Bosack v. Soward* 586 F.3d
 25 1096, 1102 (9th Cir. 2009).) The grounds set forth in Sections 10 & 11 of the FAA are the
 26 exclusive grounds for vacating and/or correcting an arbitration award under the FAA. (*Hall*
 27 *Street Associates LLC v. Mattel, Inc.* 552 U.S. 576, 584 (2008).) The FAA does not allow an

1 award to be vacated, modified or corrected for alleged erroneous legal or factual conclusions.
 2 (*Bosack, supra*, 586 F.3d at 1102.)

3 Here, WFI explicitly agreed that the FINRA arbitration panel had the authority to decide
 4 all claims and counterclaims. (Exhs. 1 & 3.) WFI agreed to abide by the FINRA arbitration
 5 panel's award and that judgment may be entered thereon. (Exhs. 1 & 3.) WFI further agreed that
 6 its agreements were binding upon its successors and assigns, which includes WFA. (Exh. 1.)
 7 There is no applicable statutory basis for vacating or correcting the arbitration award.

8 The arbitration agreement set forth in the promissory note between the parties provides
 9 that any state or federal court having jurisdiction to enter such an award may enter judgment
 10 upon any award rendered by the arbitrators. (Exh. 1.) The FINRA Arbitration Submission
 11 Agreement executed by WFI also provides that a judgment and any interest due thereon may be
 12 entered upon such award, and that the parties voluntarily consent to submit to the jurisdiction of
 13 any court of competent jurisdiction which may properly enter such judgment. (Exh. 3.) The
 14 FINRA Arbitration Submission Agreement encompasses all related cross claims and
 15 counterclaims, as well as WFI's claims. (Exh. 3.)

16 No court is specified in the promissory note nor in the FINRA Arbitration Submission
 17 Agreement. Consequently, Mr. Shaffer has the right to apply to this court for confirmation of
 18 the award and entry of judgment thereon, pursuant to 9 U.S.C. § 9, because this court is the
 19 district court for the district where the arbitration award was made. Mr. Shaffer has made such
 20 an application with the instant motion, and with his cross-petition to confirm the arbitration
 21 award and enter judgment thereon, on file with this court.

22 **IV. MR. SHAFFER SHOULD BE AWARDED HIS ATTORNEYS FEES PURSUANT
 23 TO THE TERMS OF THE NOTE.**

24 A prevailing party in an arbitration is entitled to an award of the attorneys fees incurred in
 25 enforcing the arbitration award and confirming it as a judgment, if the agreement between the
 26 parties provides for attorneys fees. (*A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401,
 27 1404 (9th Cir. 1992).)

1 Here, the promissory note between the parties contains a one-sided provision for
 2 attorneys fees to be awarded to WFI in the event that any action or lawsuit is required to be
 3 brought for the collection of any amount under the note, including all fees involved in collection.
 4 (Exh. 1, p. 2.) The note further provides that it shall be interpreted, enforced and governed by
 5 California law. (Exh. 1, p. 2) Pursuant to California Civil Code § 1717, the one-sided
 6 provision for attorneys fees in the note must be made reciprocal. Consequently, Mr. Shaffer is
 7 entitled by contract and by law to recover the attorneys fees he has incurred in enforcing the
 8 arbitration award, including the attorneys fees incurred in preparing the instant motion to confirm
 9 the arbitration award and enter judgment thereon.

10 **V. CONCLUSION**

11 Pursuant to 9 U.S.C. § 9 and the parties' agreements, and for the foregoing reasons and
 12 authorities, Kenneth C. Shaffer respectfully requests this honorable court grant his cross-petition
 13 to confirm the arbitration award issued in the *Matter of the Arbitration Between Wells Fargo*
 14 *Investments, LLC and Kenneth C. Shaffer*, FINRA Case No. 10-00773, and enter judgment
 15 thereon. Mr. Shaffer further respectfully requests this honorable court award him his attorneys
 16 fees incurred in litigating the instant motion to confirm the award, in an amount to be determined
 17 pursuant to motion at the appropriate time.

18 Dated: May 4, 2011

STANZLER LAW GROUP

19
 20 By: Melinda Jane Steuer
 21 Melinda Jane Steuer
 22 Attorneys for Respondent/
 23 Cross-Petitioner Kenneth C. Shaffer
 24
 25
 26
 27
 28

1 **PROOF OF SERVICE**

2 [C.C.P. § 1013, C.R.C. § 2008, F.R.C.P. Rule 5]

3 I, Sharran L. Rodd, state:

4 I am a citizen of the United States. My business address is 2275 E. Bayshore
5 Rd., Suite 100, Palo Alto, CA 94303. I am employed in the City of Palo Alto, County of
6 Santa Clara where this mailing occurs. I am over the age of eighteen years and not a party to
7 this action. On the date set forth below, I served the foregoing documents described as:

8 **RESPONDENT KENNETH C. SHAFFER'S NOTICE OF MOTION AND MOTION TO
CONFIRM ARBITRATION AWARD AND ENTER JUDGMENT THEREON;
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF;
DECLARATION OF KENNETH C. SHAFFER IN SUPPORT OF MOTION TO
CONFIRM ARBITRATION AWARD AND ENTER JUDGMENT THEREON**

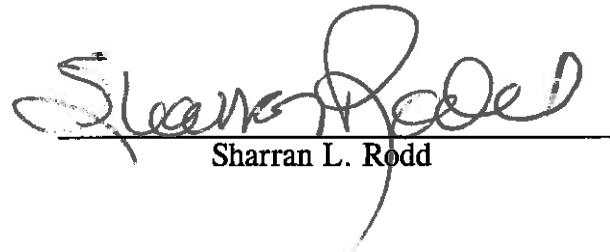
9 on the following person(s) in this action via ECF addressed as follows:

10 Fredrick A. Rafeedie, Esq.
11 Samuel E. Endicott, Esq.
12 Jones, Bell, Abbott, Fleming & Fitzgerald LLP
601 South Figueroa Street, 27th Floor
Los Angeles, CA 90017-5759

13 X: Filed and Served electronically in accordance with the Court's electronic filing
14 ("ECF") rules, pursuant to which registered ECF users receive service copies by e-
mail delivery.

15 I declare under penalty of perjury under the laws of the State of California that the
16 foregoing is true and correct and that this declaration was executed this date at Palo Alto,
17 California.

18 Dated: May 4, 2011


Sharran L. Rodd

19
20
21
22
23
24
25
26
27
28